

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APR 4 - 1934

Henry W. Hodges

CLERK

IN THE
Court of Appeals of the District of Columbia

April Term, 1934.

No. 6173

513

CAROLINE CLEVINGER,
Appellant,

vs.

J. FRANK FOOSHE, JR.,
Appellee.

BRIEF ON BEHALF OF APPELLANT

FRED B. RHODES,
COOPER B. RHODES,
Attorneys for Appellant.

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STATEMENT OF THE CASE

This is a suit brought by Caroline Clevenger for false imprisonment and assault committed upon her by the appellee. It was charged, and proof was offered to show, that the appellant met appellee at the corner of Eighteenth and Columbia Road, N. W., on the night of September 30, 1931, while she was on the way to see a sick friend. The appellee, who was employed in the same office with appellant, offered to take her in his automobile to the place where she was going, which was some four or five blocks away. Appellant, after first declining the offer of appellee, did accept and enter his automobile. Thereupon,

instead of taking her to the place where she was going, against her protest, he drove her out Sixteenth Street and from there to various points in Maryland where various assaults and indignities were committed upon her body. About midnight of the same day she escaped from his car and ran to the home of a colored farmer and his wife at Fairland, Maryland. These people had retired, but came to the door upon her knocking, and let her in. She was discussing with these two people some means of being able to reach Washington when the appellee, who had followed her to the house, entered the house with a bottle of whiskey in his hand and compelled one of the colored persons to partake of his whiskey. She then hurriedly left the house and went back to the car in the hope that she might be able to get it started and return to Washington in the car. However, there was no key in the car, and appellee, who had again followed her, again forcibly detained her in the car for a considerable time. Finally appellee became so drunk that the appellant was able to get control of the wheel and drive the car all the way back to Washington.

Practically all of the foregoing facts are admitted, excepting that the appellee claimed that he had met Mrs. Clevenger as a result of a prearranged engagement. He admitted he detained her in the car against her will and admitted practically all of the facts as to what occurred in the home of the colored people. He denied that he committed any assault or indignities upon her body but admitted striking her acci-

dently. He also denied that appellant drove the car back to Washington. Under these facts, it is naturally asked how could a jury render a verdict for the defendant? The record of the case clearly shows the answer. Instead of denying some of the very material facts alleged, the appellee brutally boasted on the stand with regard to his accomplishments and expectations of the trip in question. He attempted to escape, however, by poisoning the jury's mind by improper statements to the effect that the appellant was a woman of bad character and was an inefficient clerk.

ASSIGNMENT OF ERRORS.

The Court erred:

1. In refusing to permit counsel for plaintiff to cross examine the defendant's witness, Elizabeth K. Bonds, concerning relations of a Mrs. Hamel with the defendant.

2. In overruling the objection made by counsel for plaintiff to the question propounded to the defendant's witness, Carl B. Balluf, concerning a desirable meeting place by and between the plaintiff and defendant.

3. In refusing to permit counsel for plaintiff to examine the defendant concerning a suit which had been filed against the plaintiff by the Dixie Realty Company.

4. In refusing counsel for plaintiff to examine defendant concerning the establishment of a school by the plaintiff and a Mrs. Terrell, and concerning

a visit made by defendant to Assistant Attorney General Dodds and conversation of the defendant with said Dodds.

5. In overruling the motion made by counsel for plaintiff that a mistrial be granted by reason of the prejudicial conduct and language of the defendant and the prejudicial conduct by the witnesses and spectators which was permitted in the courtroom.

6. In refusing to grant plaintiff's Requested Instruction No. 1.

7. In refusing to grant plaintiff's Requested Instruction No. 2.

8. In refusing to grant plaintiff's Requested Instruction No. 3.

9. In refusing to grant plaintiff's Requested Instruction No. 4.

ARGUMENT.

The testimony of the appellant in this case, supplemented by the admissions of the appellee, shows a state of facts of a most revolting character. A young woman, a mother of a child 11 years of age, employed in the Prudential Life Insurance Company, was taken in an automobile to a remote section and not only detained against her will and not permitted to go home to her daughter in response to her piteous appeals, but was subjected to almost every possible indignity. Instead of having the case tried upon the issue whether these charges were true, the defense

attempted to blacken the character of this woman. One of the very first questions which the appellee's attorney asked was (page 12 of Bill of Exceptions):

Q. Specifically, did you tell him (a witness named Creel) as a result of a drunken spree you had gone over in New Mexico and married a man and slept with him only one night?

A. Oh, no; I never made any such statement.

As a matter of fact, the testimony of the witness Creel, with regard to this point, was as follows (page 31 of Bill of Exceptions):

Q. Did she ever say anything about a marriage contracted in Mexico and a trip over there?

A. No. She told me a man wanted to marry her and she had taken a trip to Mexico with him and stayed down there a week with him, I believe, but didn't marry him.

It needs no argument to establish the fact that this question was subject to the most severe criticism, and the appellate court can readily appreciate the position of the appellant after this question had been asked. If there had been an objection made, as the appellee, of course, expected, the jury would have believed that such objection was made because the appellant desired to keep this information from the jury, and it was for this reason that no objection was made. This is only a sample of the questions which were asked this witness from time to time during the trial, with the idea of poisoning the mind of the jury against appellant. She, knowing the absolute falsity of these insinuations, had a right to assume that the appellee would offer evidence

showing she had been guilty of the improper acts alleged, but an examination discloses that the only evidence of this nature was the testimony of one witness who stated that appellant had admitted to him all of these false statements. An examination of the testimony of the witness will show the character of the person so testifying. In the cross-examination of the appellant, very little attention was paid to the events relating to the assault and false imprisonment, but almost solely related to such matters as, for example, whether she owed certain bills—if she hadn't been discharged for incompetency—if she hadn't threatened to sue another man for blackmail, etc.

As a matter of fact, the testimony shows that this woman was a woman of absolute integrity, an organist in the church of which she was a member, for many years a teacher in a high school in Charleston, South Carolina, a devoted mother and a woman of unquestionable character. Other than the witness Creel, not one person testified against her character, excepting a keeper of a boarding house in Washington who testified Mrs. Clevenger had left owing certain money to her and that her other boarders considered that she tried to "highhat" the other boarders.

As a sample of the persecution which this woman suffered on the witness stand, the following may be quoted (page 18 of Bill of Exceptions):

Q. You were even arrested in connection with the Cavalier Hotel bill?

A. I was not arrested.

Again, it would be assumed that where such an intimation has been made and the jury has had before it information that appellant had been arrested for a board bill, that evidence would be offered to show that such arrest had actually been made, but no such evidence was offered, because of the falsity of the charge.

It is submitted that in view of the testimony which had been offered, the Court should have allowed great leniency to appellant in attempting to cross examine witnesses for the appellee. One of the witnesses on behalf of the appellee who testified that she had seen Mrs. Clevenger take a drink on the day of the assault, was a Mrs. Hamel. Subsequently a Miss Elizabeth King Bonds was called for appellee and was allowed to testify with regard to conversation by the appellant as to a certain party she had attended with an actress named Fifi D'Orsay, seven months previously. She was asked if she knew Mrs. Hamel and if she hadn't seen Mrs. Hamel kiss Mr. Fooshe in the office. On objection by counsel for appellee, the Court refused to allow the question to be answered, to which an exception was reserved by appellant. This witness was testifying as to various acts which had occurred in the office where these parties were, and yet while she was allowed to come in Court and tell of the various acts reflecting upon the appellant's character, she was not allowed to tell of any act which might reflect upon the appellee, or to show a relationship between one of the appellee's witnesses and appellee himself (Bill of Exceptions, page 29).

Subsequently a witness for the appellee, named Balluf (page 36 of Bill of Exceptions) testified that he knew that the appellee was to meet appellant at 18th Street and Columbia Road N. W. He could give no reason why the parties met at this particular place. Thereupon the following occurred:

Q. Mr. Balluf, on this question of the place of this meeting after discussing it at lunch time, let me see if I can refresh you——

MR. RHODES. I do not think you are entitled to refresh him.

MR. VANDOREN. If you do not think so, maybe the Court will.

THE COURT. I want to hear the question.

By MR. VANDOREN:

Q. Is there a young lady named Hughes who works in your office who also at that time was living at the address where the plaintiff lived?

A. That is what she said; yes, the young lady.

Q. Do you remember any discussion as to the desirability of meeting away from her address so Miss Hughes wouldn't find out about it?

MR. RHODES. Your Honor, I think that is highly improper.

THE COURT. The objection is overruled and you may have an exception.

MR. RHODES. In the first place this man was asked whether he could recall anything. He said he did not. I suggest that it is not proper for Mr. Vandoren to suggest any answer.

THE COURT. Go ahead and answer the question.

A. Yes, sir; I do.

By MR. VANDOREN:

Q. (Continuing) Something of that nature being said?

A. Yes.

In the testimony of the appellee (page 43 of the Bill of Exceptions) the following is found:

Q. Did you ever lay your hands on her?

A. I did.

MR. RHODES. You say you did?

WITNESS. I did.

By MR. VANDOREN:

Q. Did you attempt to kiss her?

A. No.

Q. Tell us about that.

A. When Mrs. Clevenger was on the ride back she said she was going to take the car away from me, and put her hands over on the steering wheel. And I took her hands off the steering wheel, and I said "Stay over on your side of the car. I don't want to have anything to do with you."

Q. When she attempted to take the car away from you what did she do, without using her words?

A. She put her hands on the wheel.

Q. What did she attempt to do?

A. Attempted to take the driving wheel away from me.

Q. Was it then you pushed her arms away from the driving wheel?

A. Yes, sir.

In view of the admissions of the appellee that he had refused to take this woman home, she had every legal right to attempt to take hold of the wheel, and

the blow which he admitted he gave her constituted a technical assault, for which she was entitled to a directed verdict.

On page 45 of the Bill of Exceptions, appellee testified that he did not recall he said to Mrs. Clevenger "to hell with the child; let the child freeze," but that his recollection was that he said to her "Why didn't you think of the child before you made the date?"

Probably the climax of the improper attempt which was made to poison the mind of the jury against this woman was the evidence which is related on page 45 of the Bill of Exceptions. Appellee had just testified that he had not called on and been interviewed by the police as to his participation in this assault, but later he was interviewed by the police on another matter.

By MR. VANDOREN:

Q. Was that in connection with the Garden Tea Shoppe hold-up up there?

A. It was.

He thereupon proceeded to testify that he had gone to the police department and advised them that he believed that Mrs. Clevenger was guilty of the Garden Tea Shoppe robbery:

By the COURT: (Pages 46 and 47 of Bill of Exceptions):

Q. There was a robbery at the Garden Tea Shoppe, I understand; is that right?

A. That is correct.

Q. And you heard about that robbery?

A. Yes, I heard about that robbery?

Q. And you went down to the police headquarters and said to this Sergeant, or this In-

spector, while you are investigating the Garden Tea robbery you better look into Mrs. Clevenger?

A. I did.

On further cross-examination, the witness testified as follows:

By MR. RHODES:

Q. What reason did you have to think Mrs. Clevenger was connected with the Garden Tea robbery?

A. Naturally, in making my investigations of this case.

By the COURT:

Q. Of this case we have on trial here, you mean?

A. Yes, sir. Certain facts came up to me that led me to believe from the manner in which this case has been built up, and in my conversation with you (indicating Mr. Fred Rhodes) that there was something fishy about the proposition.

By MR. RHODES:

Q. And for that reason you thought she had robbed the Garden Tea House, didn't you?

MR. VANDOREN: Wait a minute. Had he finished?

By MR. VANDOREN:

Q. Had you finished your answer?

MR. RHODES: I thought he had finished. Wait a minute. Let him finish.

MR. VANDOREN: Let him finish.

A. I had not.

MR. VANDOREN: Go ahead.

A. (Continuing) So I thought it would be a good case, a good thing for my case, if she were involved in this robbery, that it would absolutely

clear me, and that my case would never come up for trial.

As seen on page 55 of the Bill of Exceptions, counsel for defendant further examined the witness on this subject:

Q. On the incident, Mr. Fooshe, of this Garden Tea Shoppe, and your discussions about that with the police, was there anything about the facts as they then existed, or were known to you, which at all placed Mrs. Clevenger in the Garden Tea Shoppe about the time of this robbery?

A. Yes.

Q. Will you state what that was, or what the situation was as it then existed?

A. I came into the office, and on the day after Labor Day, I believe was the date, and my attention was directed to a newspaper article about this robbery, and Mrs. Clevenger had used the same remark there that night about the child that she had made in her declaration to me. So I thought it was well worth while looking into.

Q. What had Mrs. Clevenger to do with the Garden Tea Shoppe?

A. Mrs. Clevenger—may I state this here?

THE COURT: You were asked the question.

A. (Continuing) Mrs. Clevenger was cashier in the Garden Tea Shoppe, and the Garden Tea Shoppe was robbed while Mrs. Clevenger was cashier of it.

In other words, instead of trying the case as to whether appellant had been assaulted by the appellee, the jury found itself trying to determine whether or not this woman had been guilty of a hold-up in which a robbery had been committed. Other than the state-

ments made by the appellee himself, not one word of testimony was produced to substantiate the charge he made. Not a police officer or any other person connected with this crime was produced to directly or indirectly link Mrs. Clevenger with it. Is it any wonder the jury rendered a verdict for the defendant with such improper suggestions in the record?

Counsel for appellee was permitted to examine the appellant at length with regard to a certain debt alleged to have been contracted by her with the Dixie Realty Company. Counsel for appellee also questioned appellant with regard to other business dealings which she had had. However, when counsel for appellant endeavored to question appellee concerning these same matters the Court sustained objections to the questions asked. Exceptions were duly noted. This series of questions will be found on pages 48 and 49 of the Bill of Exceptions.

In the cross-examination of appellee, the following occurred (see pages 49 and 50 of Bill of Exceptions):

Q. Why didn't you let her go home and cover her baby when you said "Why didn't you think of it before"?

A. That was the first time she had asked me.

Q. She had asked you then, hadn't she, and told you her baby was cold?

A. I told her to cool off. I didn't make that statement or any statement until after she told me I was going to pay for this.

Q. So after she told you you would pay for it you kept her there, didn't you?

A. I told her to cool off.

Q. She was talking about the baby being cold, not herself being cold, when you said, "Why didn't you think of the baby before." Why didn't you let her go home and take care of the baby?

A. It is not a baby, Mr. Rhodes.

Q. Well, her child?

A. I can't go back and tell just what my reason was at that time.

Q. But you do know she asked you to let her go home.

A. I do.

Q. And said her baby was cold?

A. She asked me many times to let her go home.

Q. Why did she have to ask you a number of times to let her go home?

A. She came out with me to spend the evening. We were spending the evening.

* * * * *

Q. Did you think anything wrong would be done that night?

A. I had my hopes.

Q. Do you mean to say to this Court and jury when you left your home and your boy and girl that you felt so tender that you had hopes that you were going to ravish this woman?

A. I thought it was a cinch.

Q. You thought it was a cinch?

A. I did.

Q. What was a cinch?

A. Us to have relations that night.

Upon further cross-examination, the following took place:

By MR. RHODES:

Q. Then, Mr. Fooshe, when you told this lady,

"I will take you out and give you a dinner," what you really meant was that you would take her out and ravish her; is that what you meant?

A. I thought if it was agreeable.

Q. That is what you meant?

A. No.

Q. Had you ever talked to her on that subject, spoken to her about it?

A. No; never had any occasion to talk to her.

Upon further cross-examination, the following took place:

Q. Thought you could have sexual intercourse?

A. I had hopes. There wasn't anything definite on it. I thought I was taking a gambler's chance.

Q. What do you mean, a gambler's chance?

A. I thought it was an even break as to whether or not the thing would happen.

Q. I thought you said it was a cinch?

A. In my opinion it was.

At this point, as a result of the highly improper statements being made by appellee, the situation in the courtroom resulted in the following:

MR. RHODES. I believe a mistrial should be directed here, certainly in a case like this with this atmosphere, and I will ask now that your Honor declare a mistrial.

MR. VANDOREN. Your own atmosphere you are creating.

THE COURT. I do not think you are entitled to a mistrial under the circumstances.

MR. RHODES. I think, your Honor, where a man is allowed to make a statement like this, and

his attitude also, the case can not be tried properly.

MR. VANDOREN. It was directly in response to Mr. Rhodes' question.

THE COURT. I will overrule the motion for a mistrial and give you an exception.

Thereupon, upon further cross-examination, the following took place:

Q. Do you mean to say when she got in that car she said, "Mr. Fooshe, I would like to have sexual relations with you at some time but not tonight"? You want the Court and jury to believe that?

A. I certainly hope they do.

Q. Then what happened?

A. Then I made reply to the question.

Q. What reply did you make?

A. I said, "Why not tonight? Delay pays no dividends. It brings on only two things, old age and death".

Q. That is what you told her?

A. That is what I told her.

MR. RHODES. Your Honor, I think some precautions should be taken by the Court in regard to this matter. I think there should be no levity in the Court during the trial.

THE COURT. Of course, I quite agree with you. These people here who are spectators back there, taking no part in this trial except laughing and disturbing the Court, it will be necessary, if that sort of thing continues to clear the court room. It is not a show we are putting on here.

It will be observed from the foregoing that although the levity in the courtroom as a result of the

vulgarity of the appellee was such as to require the Court to threaten to remove the spectators, the Court refused to direct a mistrial. Exception was duly noted.

To illustrate the atmosphere that existed in the presence of the jury, the testimony of one of the witnesses for appellee, a young woman, may be quoted (page 26, Bill of Exceptions):

By THE COURT:

Q. Did they offer you a drink, too, after they blew their breaths in your face?

A. No, sir.

Q. What?

A. Too bad, wasn't it?

By MR. RHODES:

Q. What did you say?

A. Nothing.

Q. You said it was too bad. I thought you didn't drink.

A. I don't indulge. I was just making a remark to the Judge.

In view of all of the testimony, it is not understood how the Court could have refused to grant counsel for plaintiff's motion for a mistrial.

Nor can there possibly be any reason why the Court should not have granted plaintiff's Requested Instruction No. 2 to the effect that the plaintiff is required only to prove, by a preponderance of the evidence, the fact of an assault and battery upon her person by the defendant, in order that the plaintiff may be entitled to a verdict in her favor, and it was not necessary to prove evil intent on part of the defendant.

In view of the definite admission of the appellee that he compelled appellant to remain in his automobile against her wishes, it is also not understood on what theory of law the Court could have denied plaintiff's Requested Instruction No. 3 to the effect that if the jury should find that the defendant used any force whatsoever upon the person of the plaintiff, to compel the plaintiff to comply with his wishes or desires in any respect, or to compel the plaintiff to remain in his automobile with him, then the verdict should be for the plaintiff.

In view of the improper testimony that came to the jury as a result of the very apparent attempt on the part of the appellee to poison the minds of the jury, it was very important that the Court should have granted plaintiff's Requested Instruction No. 4 to the effect that the character of the plaintiff was not an issue in the case and that if the jury should find assault and battery were committed on plaintiff by defendant, the verdict must be for plaintiff, no matter what the jury believed as to character of plaintiff.

In view of the foregoing, it is respectfully submitted that the judgment in this case should be reversed and a new trial granted.

Respectfully submitted,

FRED B. RHODES,
COOPER B. RHODES,
Attorneys for Appellant.

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LUCIAN H. VANDOREN,
Attorney for Appellee.

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BRIEF ON BEHALF OF APPELLEE.

Statement of the Case.

Appellant, plaintiff below, filed her declaration in three counts against appellee in the Supreme Court of the District of Columbia. The first count charged, somewhat inartificially, the commission of certain assaults upon the appellant; the second count likewise charged the commission of certain acts which, if true,

amounted to assaults by the appellee upon the person of the appellant; and the third count charged the appellee with the false imprisonment of the appellant, by detaining her in his (appellee's) automobile, against her will.

The proof offered at the trial tended to show that, at the time of the acts complained of, both appellant and appellee were and had been for sometime employed in the office of the Prudential Life Insurance Company at 1319 F Street. That on September 30, 1931, appellant had accepted appellee's invitation to go to lunch and, before leaving the place of their mutual employment at lunch time on that day, she and the appellee and one Carl B. Balluff, another employee of the insurance office, had each taken at least two drinks of Scotch whiskey which appellee had in his desk. Appellant and appellee went, for luncheon, to Jean's, a restaurant located on De Sales Street opposite the Mayflower Hotel, and were accompanied by the witness Balluff. At the restaurant they were seated at a private booth on the second floor; additional Scotch whiskey was drunk by all of those present from the bottle which appellee had brought with him from his office; certain risqué stories were told, the appellant participating therein; and, in the course of the general luncheon conversation, appellant having made mention of her now straitened financial circumstances, appellee invited her to go with him to dinner on the same evening, which invitation appellant accepted, and an engagement was thereupon definitely made between them to meet at Eighteenth Street and Columbia Road at six o'clock, P. M. At the time of the making of this engagement, appellant stated that she was suffering from a bad cold and requested appellee to bring

“plenty of whiskey” with him for the engagement of the evening. Pursuant to their engagement appellant and appellee met at the designated rendezvous and thence drove, in appellee’s automobile, into the State of Maryland. Numerous stops were made and whiskey was drunk both by appellant and appellee.

The appellee flatly denied the commission of any act of assault upon the appellant. As to all of the events leading up to the meeting of appellant and appellee on the evening of September 30, her testimony was sharply contradicted not alone by the appellee, but by several witnesses who testified on his behalf. That count, the third, of her declaration which contained a charge of false imprisonment having been withdrawn from the consideration of the jury by the appellant, it is small wonder that the jury returned a verdict against her. Plainly, the jury chose to believe the appellee and the witnesses who testified on his behalf, rather than to accept the unsupported testimony of the appellant.

Argument.

The errors assigned by the appellant will be herein dealt with in the order in which they are considered in the brief on behalf of appellant.

For the appellant it is argued that her testimony, supplemented by the admissions of the appellee, shows a state of facts of a most revolting character. In what respect her testimony is supplemented by any admissions made by the appellee is not made to appear; nor does an examination of the testimony reveal that “revolting” state of facts of which the appellant now makes complaint. Appellant is a woman of mature

years, twice married and, at the time complained of, separated from her second husband. She is shown to have been possessed of more than native shrewdness, to have been in straitened financial circumstances, and to have been taken to the Police Court, on one occasion, by the management of the Cavalier Hotel in connection with an unpaid bill contracted by her at that hostelry. On another occasion she was shown to have removed from her lodging house leaving an unpaid bill for room and board, and, yet more significant, it was established that she had threatened to sue a former employer for some kind of a "cooked-up scandal" unless he paid to her a sum of money in order that she might thereby be enabled to take a vacation for two weeks. All of these facts were developed without objection from counsel for the appellant.

Unless, with this background, it can be said that the conduct of the appellant, in making and in keeping an engagement with the appellee, whom she knew to be a married man and of family, was revolting, it is difficult to comprehend what is meant when appellant urges that the testimony discloses a state of facts of a most revolting character. The appellant made and kept the engagement with the appellee with eyes wide open.

Appellant first complains of a question put to her on cross-examination relative to a supposed statement made by her to one Creel, later called as a defense witness by the appellee. No objection was made to this question by appellant's counsel; indeed, appellant admits the want of such objection, and attempts to excuse, argumentatively, her failure to object. No authority need be cited for the proposition that a party cannot,

on appeal, complain of a question to which no objection was made at the time it was propounded; and for the further reason that this point is not covered by any error assigned it is submitted that appellant's argument in connection therewith must prove unavailing.

Complaint is next made of a question put to appellant on her cross-examination, relative to her arrest in connection with the Cavalier Hotel bill. Answering, appellant denied the arrest. She now urges that "it would be assumed that where such an intimation has been made and the jury has had before it information that appellant had been arrested for a board bill, that evidence would be offered to show that such arrest had actually been made, but no such evidence was offered." In this situation the denial of the appellant, of the fact of her arrest, stood unimpeached before the jury; but again, no objection, even if any might properly have been made, was interposed to the question put, nor is any error assigned on this appeal in connection therewith. For these reasons, it is respectfully submitted that the contention now made is without merit.

One of the witnesses called by the appellee was a Mrs. Emily Coe Hamel, wife of an officer of the United States Marine Corps, an ex-employee of the Prudential Life Insurance Company, and a former office associate of appellant and appellee. She did not testify, as stated by appellant, that she had seen Mrs. Clevenger take a drink on the day of the alleged assault. On the contrary, she testified that about noon-time on the day in question she saw appellant, appellee and Balluff come, together, out of appellee's room in the office; that she smelled liquor on the appellant's breath, and that appellant then stated to the witness that she (appellant) had taken a drink for her cold. A subsequent

witness for the appellee, Elizabeth King Bonds, testified, on her direct examination, relative to a conversation with the appellant, in the course of which the appellant stated that she had been invited to attend a certain party given for an actress named Fifi D'Orsay; that she did not attend the party but went, instead, to a house on Sixteenth Street, where she drank with a friend; and that she (appellant) did not feel very well the next morning. During the entire direct examination of this witness, the name of the appellee was not mentioned, nor was that of the prior witness, Mrs. Hamel; neither was she asked any question concerning either of them.

On her cross-examination Miss Bonds was asked if she knew Mrs. Hamel, to which she replied affirmatively; and to a further question by counsel for the appellant she replied that she had seen Mrs. Hamel around the office. Thereupon the following occurred:

“Q. (By Mr. Rhodes). Did you ever see Mrs. Hamel kiss Mr. Fooshe in the office?

Mr. Vandoren: I object to that. It is beyond the scope of the direct.

The Court: That is not cross-examination.

Mr. Rhodes: We reserve it.”

Whether, by the use of the words “we reserve it” counsel for appellant intended to note an exception to the ruling of the Court, is not at all clear. Indeed, the Court had made a mere observation, rather than a ruling, and counsel for the appellant, choosing not to press his question, was apparently in agreement with the statement of the trial justice and content to abandon it. But even if counsel's expression be regarded as sufficient for the purpose of noting an exception,

there was no error in the ruling of the Court. It is urged for the appellant that "in view of the testimony which had been offered" the Court should have allowed great leniency to appellant in cross-examining witnesses for the appellee. It will be remembered, and the record discloses, that practically all of this "testimony which had been offered" was received without objection on the part of the appellant; and whatever the character of prior testimony, no valid reason springs therefrom for a suspension or abrogation of those time-honored rules which relate to the orderly conduct of trials and of cross-examinations. The Court was entirely right in holding that the question put, and which the Court refused to permit, was beyond the scope of the direct examination. Counsel for appellant might then, with leave of Court, or subsequently have made the witness his own in order to elicit from her an answer to his question. He did not see fit to pursue this course. It is axiomatic that the cross-examination is to be limited by the scope of the direct. *Arnstein v. U. S.*, 54 App. D. C. 199. And the trial court may in its discretion limit the scope of the cross-examination, and the ruling in question does not show an abuse of such discretion. *Harris v. U. S.*, 59 App. D. C. 353; *Horton v. U. S.*, 15 App. D. C. 310, 324; *Blitz v. U. S.*, 153 U. S. 308, 312; *Davis v. Coblens*, 174 U. S. 719, 727.

The second error assigned and relied upon by appellant is the action of the trial justice in overruling an objection made by counsel for plaintiff (appellant) to a question propounded to a witness, Balluff, by counsel for the defendant (appellee), on the re-direct examination of such witness, concerning a desirable place for the meeting of plaintiff and defendant on the eve-

ning of September 30, 1931. During the course of his direct examination the witness had stated that, at the luncheon at Jean's restaurant on that day, the appellee had invited the appellant to go out to dinner the evening of the same day, and that they were to meet at Eighteenth Street and Columbia Road at 6 o'clock.

During the cross-examination of this witness the following questions were put and answers given:

“Q. The Court has asked you why you met at Eighteenth and Columbia Road. Did you hear any definite agreement about it?

A. Yes.

Q. Just what was said about it? There must have been something said as to why you were to meet there.

A. Mr. Fooshe suggested that we meet at Eighteenth and Columbia Road; that being the logical place.

Q. Did he say why it was logical? He lives at Cleveland Park, doesn't he?

A. Well, I don't know exactly why Mr. Fooshe suggested that place. It is not within my power to know what he was thinking——

Q. (Interposing.) You do not know?

A. (Continuing.) —when he suggested that spot, but he said that would be the place to meet, and I agreed.”

What occurred on the re-direct examination of this witness is correctly set forth on pp. 8 and 9 of the brief filed on behalf of appellant. The subject-matter of the re-direct examination was proper, as it was squarely within the scope of the cross-examination. Aside from this, it is clear that the question permitted by the Court, over appellant's objection, was one designed simply to refresh the recollection of a witness as to a

matter concerning which his independent recollection was exhausted. There was no impropriety in this ruling. Such a question would have been proper, under like circumstances, even on the direct examination. Thus, Greenleaf, in the 15th edition of his work on evidence, in stating the exceptions to the rule which precludes the use of leading questions on direct examination, says that such questions may be used where an omission in the testimony of a witness is evidently caused by want of recollection, which a suggestion may assist. *Greenleaf, Law of Evidence, 15th Ed., Sec. 434, 435.* The question which is the basis of the assignment of error now under discussion was nothing more than a leading question, put for the purpose of aiding the memory of the witness; and the propriety of doing so was settled by this Court in *Shaffer v. U. S.*, 24 App. D. C., 417, at 426, where Mr. Chief Justice Alvey, who delivered the opinion of the Court, said:

“It is only where the appellate court can see that the witness has been led, by the form of the question, to make an answer prejudicial to the objecting party, that such question will be regarded as matter of substantial error. Ordinarily, the form of the question and the course of the examination of the witness are matters within the discretion of the court below, not subject to review.”

It will hardly be seriously contended that the question and answer involved in this assignment of error constituted error prejudicial to the appellant.

On page nine of appellant's brief appears certain testimony, given by appellee at the trial, which is correctly copied from the bill of exceptions. From this testimony it appears that the appellant attempted to take the driving wheel from appellee, whereupon he

pushed her arms from the wheel. From this testimony appellant reaches the somewhat startling conclusion that "the *blow* which he (appellee) admitted he gave her constituted a technical assault, for which she was entitled to a directed verdict." If any answer to this contention is necessary, several are at once apparent. The record discloses that no motion for a directed verdict was made by appellant at any stage of the trial. There was no testimony that appellee dealt appellant a "blow"; rather, he pushed her arms from the steering wheel under circumstances which gave him the right to do so. And, finally, the trial justice having taken no action, in this connection, which it is now sought to have reviewed, and the question itself not being embraced by any assignment of error included in the record, the appellant is precluded from raising the question for the first time on appeal.

Appellant, on pages ten, eleven and twelve of her brief, sets forth certain testimony given by the appellee during the course of the trial and which she cites as an improper attempt to poison the minds of the jury against her. It is to be observed, in the first place, that the testimony given by the appellee on the subject of the Garden Tea Shoppe robbery was first elicited from him on his cross-examination by counsel for the appellant. The door having thus been opened, a few questions dealing with the same subject matter were thereafter properly, it is submitted, put to the appellee by his counsel on his redirect examination. A careful search of the record will disclose that not a single objection was made by appellant to any question put, or any answer given, with reference to the incident of the robbery at the Garden Tea Shoppe. Ob-

viously, then, the trial justice was not called upon to, nor did he make, any ruling which can now be complained of. Finally, the matters discussed on those pages of appellant's brief above referred to are not covered by any error assigned by her. Her present complaint is but another example of the sheer desperation of the tactics she is willing to employ for the purpose of attempting to procure a reversal of the judgment of the court below. The jury did not find itself, as appellant suggests, trying to determine whether or not this woman had been guilty of a hold-up in which a robbery had been committed. The issues for the determination of the jury were clearly defined and limited by the charge of the trial justice, and the jury returned a verdict against the appellant for the obvious reason that it did not place any confidence in her, or in the story told by her on the witness stand.

The third error assigned by appellant, and upon which she relies, is the action of the trial court in refusing to permit her counsel to examine (cross-examine) the defendant (appellee) concerning a suit which had been filed against appellant by the Dixie Realty Company.

Page nineteen of the bill of exceptions indicates that, on the cross-examination of the appellant, the following took place:

“By Mr. Vandoren:

Q. Do you remember a suit being filed against you by the Dixie Realty Company?

A. Yes, indeed, I do. That was last summer when this woman and I went in business.”

To this question no objection was made by counsel for appellant; on the contrary, on his redirect exami-

nation of appellant, he elicited from her the fact that the Dixie Realty suit had been paid in full and the judgment marked "satisfied." Appellant thus recognized the propriety of the question put to her on cross-examination and, subsequently, through her own counsel, cleared up, on the record, any question which might have remained in the minds of the jurors as to the Dixie Realty suit.

The attention of this Court is invited to a series of questions propounded, on cross-examination, by counsel for appellant to the appellee, which appear on page forty-eight of the bill of exceptions. To these questions objection was made on the grounds that they were immaterial, and not proper on cross-examination. These objections were severally sustained by the trial justice, and his action in doing so, it is respectfully submitted, was entirely proper. The questions were directed to matters which had not even remotely been touched upon on the direct examination of the appellee, and it was within the discretion of the presiding judge thus to limit the scope of the direct examination.

Precisely the same observations may be made in connection with the fourth error assigned by appellant, which is expressed to be the refusal of the Court to permit counsel for appellant to examine appellee concerning the establishment of a school by appellant and a Mrs. Terrell, and concerning a visit made by appellee to Assistant Attorney General Dodds and conversation of appellee with said Dodds—matters altogether collateral to the issues on trial, and not touched upon during appellee's direct examination.

The fifth error assigned is the refusal of the Court to direct a mistrial by reason of the alleged prejudicial

conduct and language of the appellee and the "prejudicial conduct by the witnesses and spectators which was permitted in the Courtroom."

The situation which is here complained of is reflected by pages forty-nine to fifty-two, both inclusive, of the bill of exceptions, and by pages thirteen through seventeen of appellant's brief. Appellant's motion for a mistrial came as a result of answers given by appellee to questions put to him, on his cross-examination, by counsel for the appellant. A careful examination of these answers will disclose that they were directly responsive to the questions put; and, although it is impossible to probe the mind of the examiner, it must be presumed that, in putting his questions, he did so with the expectation that he would get answers responsive to them.

Aside from his answers given on cross-examination, it does not appear that the appellee was guilty of any conduct which could possibly have resulted in prejudice to the cause of the appellant; and the very "atmosphere" of which the appellant now complains was an atmosphere of her own making, as was observed at the trial, through the instrumentality of her own counsel. Certainly, if the answers given by the appellee tended to prejudice anyone, they tended to his own, and not to the prejudice of the appellant, in the minds of the jurors.

When counsel for the appellant suggested to the Court that some precautions should be taken to prevent levity in the court room during the trial, the trial justice immediately responded with a caution to the spectators, and warned them that any repetition of the laughter which had been indulged would result in clearing the court room.

Counsel has not pointed out any case in which a mistrial was directed under circumstances comparable to the situation of which appellant complains, nor any case in which, under like circumstances, the refusal to declare a mistrial was held to be error.

Even in criminal trials the well established rule is that the misconduct of a spectator in open court during the progress of the trial furnishes no ground for reversal, where the trial judge took the proper steps to prevent a repetition of the same and it did not appear that the jury were influenced thereby to the prejudice of the defendant. *Rhea v. State*, 104 Ark. 162, 147 S. W. 463; *Frank v. State*, 141 Ga. 243, 80 S. E. 1016; *State v. Killion*, 95 Kan. 371, 148 Pac. 463; *Smith v. State*, 95 Miss. 786, 49 So. 495; *State v. Rasco*, 239 Mo. 535, 144 S. W. 499. And the same cases hold that, in the absence of a showing to the contrary, it will generally be assumed that the jury was not prejudiced and that the court took all the necessary steps to counteract the effect of any misconduct.

The last four errors assigned by the appellant are the refusal of the Court to grant her requested instructions, numbered one, two, three and four.

Appellant's requested instruction numbered one reads as follows:

“The Court instructs the jury that if they should find from the evidence that the defendant hit or struck the plaintiff, or used any wrongful force upon her person, then the verdict should be for the plaintiff.”

Her requested instruction numbered two reads:

“The Court instructs the jury that the plaintiff is required only to prove, by a preponderance of the evidence, the fact of an assault and battery upon her person by the defendant, in order that the plaintiff may be entitled to a verdict in her favor, and it is not necessary for the plaintiff to prove evil intent on the part of the defendant.”

Appellant's requested instruction numbered three is in the following language:

“The Court instructs the jury that if they find that the defendant used any force whatsoever upon the person of the plaintiff, to compel the plaintiff to comply with his wishes or desires in any respect, or to compel the plaintiff to remain in his automobile with him, then the verdict should be for the plaintiff.”

It will be observed that the third of appellant's requested instructions fully covers the subject matter of, if indeed it does not actually duplicate, the first.

On this subject the Court, in charging the jury, said as follows:

“The law defines an assault and battery to be an unlawful or wrongful physical violence inflicted by one person upon another, without the consent of the person against whom such violence is inflicted. Any unlawful touching of the person of another, wilfully committed, is an assault and battery.

If the jury find from a preponderance of the evidence that the defendant slapped or struck Mrs. Clevenger, as alleged, then you will be warranted in finding him guilty of an assault and battery. The least touching of another in a rude, insolent

or unlawful manner is an assault and battery, and the law cannot draw a line between the different degrees of violence.

* * * * *

There is no claim of justification involved in this case. The defendant denies that he ever struck the plaintiff or in any manner committed an assault and battery upon her, and unless you are satisfied by a preponderance of the evidence that the defendant did strike or touch her in the manner stated, then your verdict must be for the defendant.

If the jury find from a preponderance of the evidence that on the evening of September 30, 1931, and during the course of an automobile ride with the plaintiff, the defendant requested the plaintiff to have sexual relations with him and then and there in an unlawful and rude manner and with force took hold of plaintiff and kissed her, placed his hands upon her breasts and attempted to raise her clothing, all against the will of the plaintiff, then your verdict will be for the plaintiff."

The charge of the trial justice correctly stated the applicable law, and sufficiently covered the propositions embraced by appellant's requested instructions numbered one, two and three, which were refused.

The appellant did not except to the Court's charge, or to any part thereof, and no modification or amplification thereof was requested by the appellant, nor did appellant request any further or additional charge to the jury.

It has repeatedly been held by this Court that the refusal of requested instructions, even though such instructions are correct in point of law and applicable to the case, is not error where the subject is fully and correctly covered by the instructions given by the Court in its general charge. *Dean v. Koppers Co.*, 49

App. D. C. 230; *Sinclair v. United States*, 49 App. D. C. 351; *Henry v. United States*, 50 App. D. C. 366; *Taylor & Co. v. Empire Fixture Co.*, 51 App. D. C. 11; *Redman v. Smith*, 51 App. D. C. 131; *Globe Co. v. Gately*, 51 App. D. C. 367; *Grock v. United States*, 53 App. D. C. 146; *Harris v. United States*, 59 App. D. C. 353. Where a comparison of the Court's instructions with the instructions requested will reveal that the former embrace the substance of the latter, no error follows from a failure to give the requested instructions. *Smith v. United States*, 50 App. D. C. 208. A court is not required to employ the precise language of a prayer for instructions to the jury in order to avoid error, even though the prayer expresses sound law as applicable to the case on trial. *Washington Times Co. v. Murphy*, 55 App. D. C. 32. Where a subject is fairly covered in the charge of the court it is not error to refuse another instruction dealing with the same matter in different language. *Arnstein v. United States*, 54 App. D. C. 199.

No error was committed by the lower court in refusing appellant's requested instruction numbered four, which reads as follows:

"The court instructs the jury that the character of the plaintiff is not an issue in this case. If the jury should find that an assault and battery were committed upon the plaintiff by the defendant, then the verdict must be for the plaintiff, no matter what the jury may believe as to the character of the plaintiff."

Of course, no testimony bearing upon the character of the plaintiff was offered or received during the course of the trial. For the purpose of impeaching the veracity of the plaintiff, who had testified as a witness in her own behalf, certain evidence was adduced to the effect

that her reputation for truth and veracity was bad. As to the effect of this testimony the court properly instructed the jury in the following language:

“If you believe from the evidence in this case that the plaintiff’s general reputation for truth and veracity is bad in the community in which she lives or among the people who know her, then you have a right to disregard her testimony as a witness as being unworthy of belief, but you are not bound to disregard it. It is for you to say, in the light of all the facts and circumstances in the case, whether any or all of her testimony is unworthy of belief, and you will give it such weight as you deem it entitled to, or none if entitled to none.”

It is deemed proper to bring to the attention of this court that there is an utter dearth of authority for any point urged by appellant, not a single case or text reference having been cited in her brief—cumulative evidence of the fact that this appeal can safely be regarded as little more than frivolous.

For the reasons hereinbefore stated it is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

LUCIAN H. VANDOREN,
Attorney for Appellee.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAY 22 1934

IN THE *Henry W. Hodges*
Court of Appeals of the District of Columbia CLERK

April Term, 1934

No. 6173

CAROLINE CLEVENGER

Appellant

vs.

J. FRANK FOOSHE, JR.

Appellee

REPLY BRIEF ON BEHALF OF APPELLANT

FRED B. RHODES,
COOPER B. RHODES,
Attorneys for Appellant.

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REPLY BRIEF ON BEHALF OF APPELLANT

A reading of the brief of appellee in this case indicates that the same practice which was followed in the lower court is now being followed in the appellate court, namely, to evade the real issue in the case by attempting to improperly attack the character of the appellant.

On page 4 of appellee's brief, counsel for appellee says, speaking of the appellant:

"She is shown to have been possessed of more than native shrewdness, to have been in straitened financial circumstances, and to have been taken to the Police Court, on one occasion, by the management of the Cavalier Hotel in connection with an unpaid bill contracted by her at that hostelry. On another occasion she was shown to have removed from her lodging house leaving

an unpaid bill for room and board, and, yet more significant, it was established that she had threatened to sue a former employer for some kind of a 'cooked-up scandal' unless he paid to her a sum of money in order that she might thereby be enabled to take a vacation for two weeks."

Aside from the apparent fact that these statements are highly improper in a case of this kind even if they are correct, the record indicates clearly that there is not the slightest foundation for such a statement being made to this court. There was not one word of evidence offered to show that this woman was ever "taken to the Police Court." On the contrary, in answer to the question by counsel for appellee, she testified positively that she was never taken to Police Court, that the only action in connection with the alleged indebtedness was a civil suit. The apparent lack of any foundation for any such charge is also emphasized by the admission of counsel for appellee on the very opposite page of his brief (p. 5). He says: "In this situation the denial of the appellant, of the fact of her arrest, stood unimpeached before the jury." Notwithstanding this admission that there was no foundation for such a charge, which charge, however, was emphasized before the jury, counsel for appellee repeated the charge in his opening statement to this court.

The statement is also made to this court on the same page of appellee's brief, that she had threatened to sue a former employer for some kind of a cooked-up scandal. Appellant denied that there was a word of truth in this charge. The only foundation for

any such statement is contained in the testimony of a man named Creel for whom this woman at one time worked. This man was a member of the firm of Creel and Creel, engaged in the automobile accessories business in this city, and the most casual examination of the statement which he was permitted to make indicates the danger of allowing testimony of this kind to be offered.

There is absolutely not a single word in the brief of appellee which attempts to excuse or justify the admitted fact that this man kept this woman for a long period of time, until practically twelve o'clock at night, on a lonely road in Maryland, against her will and in spite of her appeals to be permitted to go home. It is attempted by appellee to have this Court believe that the charge for false imprisonment was withdrawn. There is not the slightest foundation for such contention. The first count of the declaration presented the whole case, including not only the alleged assault but also the false imprisonment. Counsel for appellant elected to go to the jury on this count which included both phases of the charge against this man.

Counsel for appellee, in answer to appellant's complaint that the court refused to grant a prayer to the effect that the character of the appellant was not in issue in the case, admits that the character of the witness was not in issue but says that the appellee was justified in bringing out these various charges against appellant as a foundation for making inquiries of the witness as to whether or not the witness knew

what the reputation of the appellant was for truth and veracity. It can hardly be conceived that such a legal proposition would be incorporated into a brief submitted to this court. In the first place there is no foundation for the statement that these charges against this woman's character were made as a preliminary basis for asking what the appellant's reputation was for truth and veracity. Of the array of witnesses who were brought in to assail this woman's character, only two were asked as to her reputation. One of these was the witness Creel whose testimony does not deserve to be dignified as worthy of comment, and the other was a Mrs. Henderson who testified that the appellant had left her boarding house leaving an unpaid board bill. This witness admitted she had never heard anyone discuss Mrs. Clevenger's reputation excepting one woman who had stated that Mrs. Clevenger tried to "high hat" people.

Witness Balluff, who it appears was a close intimate friend of the appellee, assailed her character by testifying that on the day of the assault he had gone to lunch with the appellant and appellee and certain improper stories were told. Not one question was asked of this witness as to what the character of appellant was. Witness Elizabeth King Bonds was called on behalf of appellee and testified that appellant had told her that on one occasion she had been prevented from attending a party with an actress, because she had become drunk. Not one word was asked of this witness as to what the reputation of the appellant was. Witness Emily Coe Hamel was

called by appellee, and she also testified as to alleged conversation with appellant concerning a previous occasion she is alleged to have admitted she was drunk. Not one question of this witness was asked by counsel for appellee as to the reputation of appellant. It would appear therefore that the excuse offered for the introduction of this improper testimony in this case has no application. Assuming, however, that these witnesses had been asked as to the reputation of appellant, it must be admitted that this would not have afforded the appellee any excuse for bringing into the case the reprehensible charges which were made in the presence of jury which tried this case. By the very nature of the case such charges could not be answered. For example, the appellant would not be permitted to offer evidence that the witness Creel was mentally irresponsible and yet the jury trying this case was permitted to hear this man testify that this woman had tried to blackmail him, whereas, as a matter of fact, the appellant had to file a civil suit against him which is still pending, to recover her salary.

Probably the most flagrant disregard of the rights of appellant in the lower court was the attempt which was made to have it appear that she was responsible for the Garden Tea Shoppe robbery. Counsel for appellee attempts to excuse this by saying that the Garden Tea Shoppe robbery was first brought out by appellant upon cross examination of appellee. This is not correct. An examination of the Bill of Exceptions (p. 45) will show that in the direct exami-

nation of appellee by his counsel he was specifically asked concerning the Garden Tea Shoppe robbery. The asking of this question by counsel for appellee was ample justification for the motion which was later made to declare a mistrial. Nothing which could be said or done by anyone could correct the effect of attempting to fix this atrocious crime on an absolutely innocent woman. This court has repeatedly held that even to indicate to a jury that an insurance company is liable for the ultimate payment of a judgment is sufficient ground for the declaring of a mistrial. Certainly every rule of evidence, aside from every question of fair play, would have suggested the reprehensible character of this defense and the need for the Court to have declared a mistrial, when such motion was later made.

It is apparent from the record in this case that this suit was not brought with any idea of securing any money return. It would require quite a flight of the imagination to expect that this insurance agent working on commission would be able to respond in damages for the wrong committed by him. The record shows that all this woman asked was an apology from this man for treatment she received. It ought not to have even been necessary for her to ask this. On page 11 of the Bill of Exceptions it appears that appellant told appellee that he must either apologize or she would report him. He replied if she reported him she would lose her position. Although she did not report him, she did lose her position in two weeks. Not satisfied by having had this woman lose her posi-

tion by reason of his wrong, the record shows that the appellee continued to hound her in every manner possible, even to the extent of reporting her to the police because he heard she was raffling an automobile (p. 46 of Bill of Exceptions). Is it any wonder that she felt her only redress, in order to stop this persecution, was to file a suit against him?

The testimony of the two colored people to whom she at midnight appealed for protection, gives a better picture than any words of the ordeal through which she passed. Yet there is not one word in appellee's brief attempting to offer any extenuation of the crime of the appellee. A grave injustice was perpetrated on this woman at her trial and she is entitled to have her case tried free from all the vicious and baseless charges and insinuations which were permitted at the trial below.

Respectfully submitted,

COOPER B. RHODES,

FRED B. RHODES,

Attorneys for Appellant.